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Department of the Treasury

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Date:

August 14, 2012

In Re:

Legend:

Decedent	=
Spouse	=
Trust	=
Year 1	=
Year 2	=
Date 1	=
Date 2	=
Date 3	=

Dear :

This letter responds to a letter from your authorized representative dated May 15, 2012, requesting an extension of time under § 301.9100-1 and § 301.9100-3 of the Procedure and Administration Regulations: (i) to sever a QTIP Trust into a GST Exempt QTIP Trust and a GST Nonexempt QTIP Trust pursuant to § 26.2654-1(b)(1) of the Generation-Skipping Transfer Tax Regulations; (ii) to make a reverse Qualified Terminable Interest Property (QTIP) election under § 2652(a)(3) of the Internal Revenue Code with respect to the GST Exempt QTIP Trust; and (iii) a ruling that the automatic allocation rules under § 2632(c) (in effect in Year 1, renumbered without change as § 2632(e) on June 7, 2001 and in effect in Year 2), apply to the GST Exempt QTIP Trust.

The facts and representations submitted are summarized as follows. On Date 1 in Year 1, Decedent and Decedent's spouse, Spouse, created a revocable trust, Trust. Section 6 of Trust provides that upon the death of the first to die of Decedent and Spouse, the trustee is to divide the trust estate into three separate trusts, the Survivor's Trust, the Exemption Trust, and the QTIP Trust. This ruling pertains to the QTIP Trust.

Section 6C provides that the trustee is to fund the QTIP Trust with property not allocated to the Survivor's Trust and the Exemption Trust. Section 6C(6) provides that if the property allocated to the QTIP Trust exceeds the deceased spouse's available GST exemption amount under § 2631, the trustee is to establish two trusts, a GST Exempt QTIP Trust and a GST Nonexempt QTIP Trust. The trustee is to distribute to the GST Exempt QTIP Trust property equal in value to the amount of the deceased spouse's GST exemption that is to be allocated to the QTIP Trust; and allocate that GST exemption to the GST Exempt QTIP Trust. The trustee is to distribute the balance of the property allocable to the QTIP Trust to the GST Nonexempt QTIP Trust. The GST Exempt and Nonexempt Trust are to be separate trusts with the same terms and beneficiaries and all references to the QTIP Trust in Trust are to be to these two trusts.

Section 6G provides that trustee is to pay the net income of the QTIP Trust in monthly or other convenient installments, not less frequently than quarterly, to or for the benefit of the surviving spouse for life. Upon the death of the surviving spouse, the principal and accrued undistributed net income, if any, of the QTIP Trust is to be added to and become part of the Exemption Trust. If, however, the QTIP Trust consists of a GST Exempt and GST Nonexempt Trust, only the GST Exempt Trust is to be added to and become a part of the Exemption Trust to benefit Decedent and Spouse's children.

Decedent died on Date 2 in Year 1, survived by Spouse and three children. Spouse was the executor of Decedent's estate. Spouse's accountants failed to advise Spouse to file, on behalf of Decedent's estate, a timely Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. Spouse retained a new accountant in Year 2. Pursuant to this accountant's advice, Spouse filed a Form 706 for Decedent's estate in Year 2. On the Form 706, the QTIP Trust was listed on Schedule M. Accordingly, the executor is deemed to have made a QTIP election with respect to the QTIP Trust as of the date of Decedent's death. The executor, however, did not divide the QTIP Trust into a GST Exempt and Nonexempt Trust or make a reverse QTIP election for the GST Exempt QTIP Trust in order to allocate Decedent's remaining GST exemption to this trust.

Spouse died on Date 3. The failure to divide the QTIP Trust into a GST Exempt and Nonexempt QTIP Trust and to make a reverse QTIP election for the GST Exempt QTIP Trust was discovered shortly after Spouse's death. It is represented that Decedent has sufficient GST exemption available to allocate to the GST Exempt QTIP Trust.

Law and Analysis

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2044 provides that the value of the gross estate shall include the value of any property for which a deduction was allowed with respect to the transfer of such property to the decedent under § 2056(b)(7) in which the decedent had a qualifying income interest for life.

Section 2056(a) provides that, for purposes of the tax imposed by § 2001, the value of the taxable estate shall, except as limited by § 2056(b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

Section 2056(b)(1) provides that where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest - (A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and (B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B)) - (C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

Section 2056(b)(7)(A) provides that, in the case of qualified terminable interest property, for purposes of § 2056(a), such property shall be treated as passing to the surviving spouse, and for purposes of § 2056(b)(1)(A), no part of such property shall be treated as passing to any person other than the surviving spouse.

Section 2056(b)(7)(B)(i) defines the term “qualified terminable interest property” as property: (I) which passes from the decedent; (II) in which the surviving spouse has a qualifying income interest for life as defined in § 2056(b)(7)(B)(ii); and (III) to which an election under § 2056(b)(7) applies.

Section 2056(b)(7)(B)(ii) provides that the surviving spouse has a qualifying income interest for life if - (I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and (II) no person has a power to appoint any part of the property to any person other than the surviving spouse. Subclause (II) shall not apply to a power exercisable only at or after the death of the surviving spouse.

Section 2056(b)(7)(B)(v) provides that an election under § 2056(b)(7) with respect to any property shall be made by the executor on the return of tax imposed by § 2001. Such an election, once made, shall be irrevocable.

Section 20.2056(b)-7(b)(4)(i) of the Estate Tax Regulations provides that, in general, the election referred to in § 2056(b)(7)(B)(i)(III) and (v) is made on the return of tax imposed by § 2001 (or § 2101). For purposes of this paragraph, the term “return of tax imposed by § 2001” means the last estate tax return filed by the executor on or before the due date of the return, including extensions or, if a timely return is not filed, the first estate tax return filed by the executor after the due date.

Section 2601 imposes a tax on every generation-skipping transfer (within the meaning of subchapter B) made by a “transferor” to a skip person. Under § 2611(a), the term “generation-skipping transfer” means a taxable distribution, a taxable termination, and a direct skip.

Section 2602 provides that the amount of the tax imposed by § 2601 is the taxable amount multiplied by the applicable rate. Section 2641(a) defines the term “applicable rate” with respect to any generation-skipping transfer, as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Section 2631(a), as in effect for the year at issue, provides that for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 (adjusted for inflation under § 2631(c)) which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation under § 2632(a) once made, is irrevocable.

Section 2632(a)(1) provides that any allocation by an individual of his or her GST exemption under § 2631(a) may be made at any time on or before the date prescribed for filing the estate tax return for such individual’s estate (determined with regard to extensions), regardless of whether such a return is required to be filed.

Section 2632(c)(1), in effect in Year 1 and renumbered without change to § 2632(e) on June 7, 2001, in effect in Year 2) provides that any portion of an individual’s GST exemption that has not been allocated within the time prescribed by § 2632(a) shall be deemed to be allocated as follows: (A) first, to property which is the subject of a direct skip occurring at such individual’s death, and (B) second, to trusts with respect to which such individual is the transferor and from which a taxable distribution or a taxable termination might occur at or after such individual’s death.

Section 26.2632-1(d)(2) provides, in part, that a decedent’s unused GST exemption is automatically allocated on the due date for filing Form 706 to the extent not otherwise allocated by the decedent’s executor on or before that date.

Unused GST exemption is allocated pro rata, on the basis of the value of the property as finally determined for purposes of chapter 11 (chapter 11 value), first to direct skips treated as occurring at the transferor's death. The balance, if any, of unused GST exemption is allocated pro rata on the basis of the chapter 11 value of the nonexempt portion of the trust property to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made.

Section 2652(a)(1) provides, in part, that for purposes of chapter 13, the term "transferor" means in the case of any property subject to the tax imposed by chapter 11, the decedent. An individual shall be treated as transferring any property with respect to which such individual is the transferor.

Section 2652(a)(3) provides, in part, that in the case of any trust with respect to which a deduction is allowed to the decedent under § 2056 by reason of subsection (b)(7), the estate of the decedent may elect to treat all of the property in such trust for GST tax purposes as if the election to be treated as qualified terminable interest property had not been made (reverse QTIP election).

Section 26.2652-2(a) provides, in part, that a reverse QTIP election is not effective unless it is made with respect to all of the property in the trust to which the QTIP election applies. Section 26.2652-2(b) provides that an election under § 2652(a)(3) is made on the return on which the QTIP election is made.

Section 26.2654-1(b)(1) provides, in part, that the severance of a trust that is included in the transferor's gross estate (or created under the transferor's will) into two or more trusts is recognized for purposes of chapter 13 if the trust is severed pursuant to a direction in the governing instrument providing that the trust is to be divided upon the death of the transferor and the terms of the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original instrument and the severance occurs prior to the date prescribed for filing the federal estate tax return (including extensions actually granted) for the estate of the transferor and the new trusts are severed on a fractional basis.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute).

Based on the facts submitted and representations made, we conclude that the requirements of § 301.9100-3 are satisfied. Therefore, Decedent's estate is granted an extension of time of 120 days from the date of this letter to sever the QTIP Trust into a GST Exempt QTIP Trust and a GST Nonexempt QTIP Trust and to make a reverse QTIP election with respect to the GST Exempt QTIP Trust. Further, we rule that the automatic allocation rules of § 2632(e) apply to automatically allocate Decedent's unused GST exemption to the GST Exempt QTIP Trust.

The reverse QTIP election should be made on a supplemental Form 706 for Year 1. The Form 706 should be filed with the Cincinnati Service Center at the following address: Internal Revenue Service Center, Cincinnati, OH 45999. A copy of this letter should be attached to the supplemental Form 706.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Lorraine E. Gardner

Lorraine E. Gardner
Senior Counsel, Branch 4
(Passthroughs & Special Industries)

Enclosures

Copy for section 6110 purposes